Nebraska Law Review

Volume 45 | Issue 1 Article 10

1966

A Legislative Approach to the Fourth Amendment

E. John Stanley
University of Nebraska College of Law

Legislation

A LEGISLATIVE APPROACH TO THE FOURTH AMENDMENT

I. INTRODUCTION

Legislatures of several states have recently expressed an unprecedented interest in the fourth amendment of the United States Constitution[1] by enacting statutes governing police and court procedures for search and seizure problems. New York, for example, has adopted the much publicized "knock not"[2] and "stop and frisk"[3] statutes. California, which has had more fourth amendment litigation than any other state, has legislatively attempted to expand the scope of statutorily authorized seizures.[4] Nebraska, following the lead of these states, has completely rewritten its search and seizure statutes. Nearly all of the Nebraska statutes are adaptations of statutes which have originated in other states. The fact that Nebraska, a state with few metropolitan areas and a resulting low per capita crime rate, has enacted these statutes, when the apparent need for them is slight, suggests that the motivation for their passage must have been something other than need. That motivation was *Mapp v. Ohio*.[5] Prior to *Mapp* there was little fourth amendment legislative activity by the states.[6] Although *Wolfe v. Colorado*[7] had applied the "core" of the fourth amendment to the states, local law enforcement agencies were often indifferent to the restrictions which the amendment theoretically placed upon their activities since any evidence seized during an unconstitutional search was still admissible in the state courts.[8] *Wolfe* held the exclusionary rule to be inapplicable to the states,

---

[1] The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[2] N.Y. CODE CRIM. PROC. § 799.

[3] N.Y. CODE CRIM. PROC. § 180(a).

[4] CAL. PEN. CODE § 1524.

[5] 367 U.S. 643 (1961).

[6] *But see* DEL. CODE ANN. tit. 11, §§ 1902-03 (1953); R. I. GEN. LAWS ANN. §§ 12-7-1 to -2 (1956); N.H. REV. STAT. ANN. §§ 594:2, 594:3 (1960); HAWAII REV. LAWS §§ 255-4, 5 (1955); MASS. GEN. LAWS ANN. ch. 41, § 98 (1961).

[7] 338 U.S. 25 (1949).

[8] *Id.* at 28.

and the resulting practical effect on police procedure was negligible. The fourth amendment was an empty promise.

In 1961, because some states had failed to voluntarily adopt the exclusionary rule,[9] in *Mapp*, the United States Supreme Court gave teeth to the amendment and held the exclusionary rule applicable to the states.[10] Justice Clark observed:

> Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise.[11]

Mapp forced state compliance with the fourth amendment by excluding from a state criminal prosecution any evidence seized in violation of the accused's constitutional rights.

But the imposition of the constitutional standards of search and seizure upon the states has not been the only practical effect of *Mapp*. It also imposed upon them the quagmire of confusion which has surrounded the fourth amendment. For over seventy-five years federal law enforcement officials have been plagued by an amendment brimming with contradiction and confusion.[12] In no other area of constitutional law has confusion been so predominant. Much of this confusion is no doubt attributable to the slim margins upon which major decisions have been based.[13] A minor change in the composition of the court has often resulted in the complete overruling of a prior decision.[14] Confusion rather than clarity has been the rule. Even the members of the Court

---

[9] Nebraska was one of those states. "It is the doctrine of this state that information pertinent to an issue is admissible in evidence notwithstanding it was obtained in an irregular or illegal manner. The fact that the constitutional guarantee concerning search and seizure has been violated does not render the information received thereby inadmissible. . . ." Haswell v. State, 167 Neb. 169, 171, 92 N.W.2d 161, 163 (1958).

[10] Mapp v. Ohio, 367 U.S. 643 (1961).

[11] *Id.* at 660.

[12] The first important case interpreting the fourth amendment and possibly the origin of a portion of this confusion was Boyd v. United States, 116 U.S. 616 (1886).

[13] "Out of approximately 30 search and seizure cases decided by the Court during the period, (1945-61) nearly two-thirds were determined by 6-3 or 5-4 votes." *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 666 n.15 (1961).

[14] For example, Trupiano v. United States, 334 U.S. 699 (1948), was expressly overruled less than two years after it was decided by Rabinowitz v. United States, 339 U.S. 56 (1950).

have recognized and often commented on this: "In no other field has the law's uncertainty been more clearly manifested."[15] "The course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth."[16]

A major cause of this confusion has been the problem of interpreting an amendment, which is largely devoid of historical guidelines,[17] to meet the practical problems of crime prevention created by a modern society. The existence of this confusion is most unfortunate because day-to-day problems of law enforcement on the local level require easily ascertainable standards of procedure for policemen and courts that are not, at best, well versed in subtle distinctions often made by the Supreme Court.

Congressional legislation could have eliminated much of this confusion by providing guidelines for implementing the amendment, as has been done in many other areas.[18] Congress, however, failed to do so, the result of which has been an aggravation of the problem and a compounding of the confusion.

With an application of the fourth amendment to the states and an awareness by them of the practical problems presented by the application of the amendment to local problems, legislation by the states is an excellent, if not ideal, solution to the establishment of guidelines for the implementation of the amendment.[19] This legislation could serve the two-fold purpose of codifying standards of search and seizure in areas where they have been established by the Supreme Court, and, at the same time, provide workable standards for police to follow where none have been expressed

---

[15] Rabinowitz v. United States, 339 U.S. 56, 67 (1950) (Black, J. dissenting).

[16] Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J. concurring).

[17] See Reynard, *Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L.J. 259 (1950).

[18] The only recent *major* federal legislation was the National Prohibition Act which contained several explicit provisions for the seizure of illicit liquor. 41 Stat. 305 (1919). See Appendix to Davis v. United States, 328 U.S. 582, 616, (1946) (Frankfurter, J. dissenting) for a list of congressional enactments relating to the fourth amendment.

[19] Legislation on a local level, despite the lack of uniformity that would be created, would undoubtedly be much more effective than federal legislation, because local problems, which vary greatly between areas, could be recognized. For example, problems of rural crime prevention, as in Nebraska, certainly would not require legislation as restrictive of individual liberties as would be necessary in the large metropolitan areas such as New York City.

by the Court. With these goals in mind let us examine the recent Nebraska legislation.

II. RECENT NEBRASKA LEGISLATION

Many of the recently adopted Nebraska statutes are adaptations of Federal Rule 41.[20] Several additions and modifications have been made to the Federal Rules, however. In addition, several statutes not originating in the Federal Rules have been adopted by both the 1963 and 1965 sessions.

A. The Evidentiary Search

Neb. Rev. Stat. section 29-813[21] provides that a warrant may be issued to search for three distinct types of property: (1) property stolen, embezzled, or obtained under false pretenses, (2) designed or intended to be used for the commission of a crime, and (3) possessed, controlled, designed, or intended for use in violation of the laws. This statute is a derivation of Federal Rule 41 and has been adopted in several states.

A provision has been added to the statute, however, which is not included in Rule 41. It provides that:

> A warrant may be issued . . . to search for and seize any property which constitutes *evidence* that a criminal offense has been committed or that a particular person has committed a criminal offense.[22]

This section appears to be a derivation of a similar California statute which provides for the issuance of a warrant for "any evidence which tends to show a felony has been committed."[23]

Serious constitutional questions are presented by this statute. The *federal standards*[24] of search and seizure prohibit the seizure

---

[20] Fed. R. Crim. P. 41.

[21] Neb. Rev. Stat. § 29-813 (Supp. 1963).

[22] Neb. Rev. Stat. § 29-813 (Supp. 1963). (Emphasis added.)

[23] Cal. Penal Code § 1524(4); See Manwaring, *California and the Fourth Amendment*, 16 Stan. L. Rev. 318, 327-28 (1964). See also Wis. Stat. § 963.02(10) (1958), which allows the seizure of any evidence of a crime.

[24] Although Mapp v. Ohio, 367 U.S. 643 (1961), had held the fourth amendment applicable to the states the Court failed in *Mapp* to state whether the standards of reasonableness applicable to the states under the fourteenth amendment were identical to the fourth amendment standards of reasonableness applicable to the federal courts. In Ker v. California, 374 U.S. 23 (1963), this question was answered when the Court held that the fourth amendment, as applied through the four-

of evidentiary material; seizures are limited to what has been termed the "fruits" of crime. The federal prohibition against the search for evidence is absolute, and any search for evidence is *per se* unreasonable.[25]

The Supreme Court has generally distingushed between seizable articles and evidence on the basis of the state's right to possession of the article. Thus, there has developed around the prohibition several classes of seizable articles. These include instruments of a crime (the government having a right to seize the article to suppress the nuisance it created),[26] stolen property (the true owner being entitled to possession),[27] excisable or dutiable goods (the government having a lien on the goods for unpaid duties),[28] and contraband (possession being illegal).[29] Articles not within these classes are merely evidentiary in nature[30] and are pro-

---

teenth, imposed limitations upon state activity identical to those imposed upon federal activity so that a desired uniformity between federal and state law enforcement agencies can be maintained.

But the Court in *Ker* expressly stated that those rules which reflect the Supreme Court's supervisory authority over the lower federal courts are not applicable to the states. [The Supreme Court is given supervisory power over the lower federal courts by 62 Stat. 846 (1948), 18 U.S.C. § 3771 (1964). Thus evidence may be inadmissible in federal courts even though it does not violate the federal constitution. Elkins v. United States, 364 U.S. 206 (1960); McNabb v. United States, 318 U.S. 332 (1943).] Admissibility of evidence in the state courts is to be determined solely by the *constitutional* proscriptions, for the Supreme Court has no supervisory power over the state courts.

From *Ker* three conclusions affecting state legislative activity can be drawn: (1) where the federal standards of reasonableness have a constitutional basis they are applicable to the states, and the legislature is precluded from sanctioning nonconformity by state officials; (2) where the federal standards are not of a constitutional basis, but arise out of the Court's supervisory power over lower federal courts, these standards are inapplicable to the states, and the states are free to establish their own standards within the confines of the reasonableness requirement of the fourth amendment; (3) where no federal standards have been expressed by the Court the legislature is free to establish standards to promote local law enforcement, so long as these standards meet the reasonableness test of the fourth amendment.

25 Gouled v. United States, 255 U.S. 298 (1921).

26 Marron v. United States, 275 U.S. 192, 199 (1927).

27 Boyd v. United States, 116 U.S. 616, 623-24 (1886).

28 *Ibid.*

29 Harris v. United States, 331 U.S. 145, 154-55 (1947).

30 On Lee v. United States, 343 U.S. 747 (1952), held the evidentiary prohibition applicable only to tangible objects. But Wong Sun v. United States, 371 U.S. 471 (1963), which held oral statements made during an unreasonable search and seizure inadmissable, would seem to overrule this by implication.

tected from seizure by the fourth amendment.[31]

The sole basis for the constitutionality of the Nebraska statute is found in the language in *Ker* which qualified the application of the federal standards of search and seizure, applying to the states only those standards which do not reflect the Supreme Court's *supervisory authority* over the lower federal courts. Only if the prohibition against a search for evidence has no constitutional basis, but arises solely out of the Court's supervisory power, is the statute constitutional.

The premise that the prohibition has no constitutional basis is doubtful when its history is reviewed. The prohibition dates back to the early English case of *Entick v. Carrington*,[32] decided in 1765. Entick was the author of a book which offended the government and was regarded as seditious libel. In enforcing the book-licensing act a general warrant was issued naming Entick, but failing to name the article to be seized. Carrington, in executing the warrant, broke into Entick's house, and conducted a search which lasted four hours and culminated in the carrying away of several hundred charts and pamphlets. Entick sued Carrington in trespass for damages, and Carrington asserted the warrant as a defense.

In affirming the trial court's verdict for Entick, Lord Camden based his decision on two points. First, a search cannot be used as an investigative tool; the evidence upon which to base a search must be known before the warrant is issued. It was Lord Camden's observation that the very fact the search was for evidence was indicative of the insufficiency of the proof necessary to justify the issuance of the warrant. The second basis of the decision involved the concept of seizure of evidence as a form of self-incrimination. This was later cited with approval in *Boyd v. United States*.[33] In *Boyd* the federal government contended that goods had been illegally imported in violation of the customs laws and an action was brought calling for the forfeiture of the goods. An act of Congress made failure to produce certain documents concerning the goods a conclusive presumption of guilt. The Supreme Court sustained the defendant's contention that the statute requiring production of the documents violated his fifth amend-

---

[31] If it is objectional to seize the article the government is further prohibited from using the objects to obtain other incriminating evidence against the defendant. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[32] 19 Howell's State Trials 1029, 95 Eng. Rep. 807 (1765).

[33] 116 U.S. 616 (1886).

ment right against self-incrimination and, in addition, held it to be an unreasonable search and seizure in violation of the fourth amendment. In the Court's opinion, Justice Bradley quoted *Entick v. Carrington* for the proposition that the two rights were intertwined and then summarized:

> [A]ny forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.[34]

This similarity between the search for evidence and self-incrimination was again recognized in *Mapp* when the Court quoted *Boyd's* comparison of the fourth and fifth amendments with approval.[35]

Although the prohibition against the search for evidence has been severely criticized,[36] when the common law basis of the prohibition and its subsequent approval in *Boyd* and *Mapp* are considered along with its interrelationship with the fifth amendment, which has been held applicable to the states,[37] it is doubtful the rule arises out of the Court's supervisory power and has no constitutional basis. A final determination must, of course, await a Supreme Court decision, but the evidence overwhelmingly favors the application of the prohibition to the states. It would thus appear that the statute authorizing the evidentiary search, being in violation of the prohibition, is unconstitutional.

B. Procedural Statutes

Several of the new statutes are strictly procedural in nature. Typical is Neb. Rev. Stat. section 29-822 which provides that any motion to suppress seized evidence must be made at least ten days before trial, or at the time of arraignment, whichever is later. Failure to make timely motion constitutes waiver of the right to move for exclusion of the evidence.[38] Where the defendant is surprised by the evidence, however, the court may entertain a motion to sup-

---

[34] *Id.* at 630.

[35] Mapp v. Ohio, 367 U.S. 643, 646 (1961).

[36] See Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Calif. L.R. 474, 477-79 (1961). *But see* Comment, *Limitations on Seizure of "Evidentiary" Objects—A Rule in Search of a Reason*, 20 U. Chi. L. Rev. 319 (1953), which suggests that the reason for the rule lies in the need for additional protection of the right to privacy. See also 20 Mich. L. Rev. 93 (1921).

[37] Malloy v. Hogan, 378 U.S. 1 (1964).

[38] Neb. Rev. Stat. § 29-822 (Supp. 1963).

press. This is an adaptation of Federal Rule 41(e),[39] the relevant part providing: "The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

In *Segurola v. United States*[40] the Supreme Court upheld such a procedure. The defendant had failed to object to the evidence (illegally seized liquor) at the time of its introduction. Only at the conclusion of the government's case was a motion made to suppress the evidence. The trial court denied the motion, and on appeal the Supreme Court affirmed, stating that:

> [E]xcept where there has been no opportunity to present the matter in advance of trial . . . a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence.[41]

Obviously, the orderly administration of justice requires that motions to suppress be made before the trial wherever possible.[42] With such a procedure expressly authorized by the Supreme Court there can be little doubt that the Nebraska statute is constitutional.

Neb. Rev. Stat. section 29-823 is less justifiable than the pretrial motion requirement. It provides that all questions of fact on motion to suppress shall be tried without jury and: "No evidence shall be suppressed because of technical irregularities not affecting the substantial rights of the accused."[43] The statute is directed toward preventing what Justice Cardozo was referring to when he said: "[T]he criminal is to go free because the constable has blundered."[44] But such an approach to the problem of nonsubstantive error promotes police negligence and ignorance. What policeman will bother to check a warrant for a correct name

---

[39] 62 Stat. 820 (1948); 18 U.S.C. § 3114 (1964).

[40] 275 U.S. 106 (1927).

[41] *Id.* at 111-12.

[42] A second reason often given by the courts for denying the objection after the trial has commenced is that a prosecutor may be misled and rely on that evidence to prove guilt, and, as a result, fail to acquire other evidence which would be unnecessary if no objection was made. See State v. Davis, 1 Ohio St. 2d 28, 203 N.E.2d 357 (1964).

[43] NEB. REV. STAT. § 29-823 (Supp. 1963).

[44] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

or address if the court will excuse his mistake? A premium will be placed on police ignorance at the expense of the accused's procedural rights. Little justification can be found for such a statute.

A great deal of discretion has, as always, been given to the states in the administration of their courts. The application of the fourth amendment to the states represents no infringement on that discretion. This was emphasized in *Mapp*:

> As is always the case . . . state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected.[45]

The states are free to establish any procedures they desire subject, as always, to the due process clause.

C. THE STOP AND FRISK STATUTE

The 1965 session of the Nebraska legislature adopted the controversial "stop and frisk" statute[46] which significantly broadens statutory police authority. It authorizes a policeman to stop, in a public place, any person whom he reasonably suspects has committed, is committing, or is about to commit a crime, and provides that he may demand the individual's name, address, and an explanation of his actions. It further provides that if the officer reasonably suspects that he is in danger of life or limb, he may search the person detained for dangerous weapons. If the officer finds a weapon or any article possession of which is a crime, he may take and retain it until the end of the questioning, at which time he shall either return the article or arrest the person.[47]

Prior to the passage of this statute policemen were not authorized to *detain* a person for questioning on the basis of *"reasonable suspicion"*, nor did police have authority to search an individual for dangerous weapons until an arrest had been made. The federal constitution requires that arrests and searches be based upon probable cause. By requiring only reasonable *suspicion* upon which to *detain and search* a person, the statute sets up a lesser standard for a *detention* than is required by the constitution for an *arrest*.[48]

---

[45] Mapp v. Ohio, 367 U.S. 643, 659 n.9 (1961).

[46] Neb. Laws 1965, ch. 132, at 471. The name "stop and frisk" is a misnomer because the statute expressly authorizes a *search* incident to the detention and not a frisk.

[47] The detention is a frequently used police tactic. See Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952).

[48] Nathanson v. United States, 290 U.S. 41, 47 (1933). Held: "Mere affirmance of belief or suspicion is not enough [to sustain a search]."

The "stop and frisk" statute originated in New York,[49] where it was passed amidst considerable controversy and opposition.[50] While New York limited the right to detain to felonies and certain misdemeanors, the Nebraska legislature has revised the statute and extended it to "any crime."[51] The statute is a derivation of the Uniform Arrest Act[52] which provides for the stopping and questioning of an individual up to two hours when there is "reasonable grounds to suspect" a crime. A search for dangerous weapons is also authorized to protect the officer. The Uniform Arrest Act grants considerably greater authority to the police than the "stop and frisk" statute. Nevertheless, it has been adopted by two states in toto,[53] and with the period of detention extended, by a third.[54] Massachusetts, Hawaii, and Missouri have also adopted statutes authorizing detentions,[55] and detentions have been judicially authorized in other states.[56]

A case which well illustrates the statute's inherent constitutional problems is *Rivera v. People*,[57] which was recently decided by the New York Court of Appeals. At 1:30 in the morning

---

[49] N.Y. CODE CRIM. PROC. § 180(a). See generally 30 BROOKLYN L. REV. 274 (1964); 38 ST. JOHN'S L. REV. 392, 398 (1964); 78 HARV. L. REV. 473 (1964).

[50] "Committees of the New York City and State Bar Associations disapproved of the bill as enacted and questioned its constitutionality." 78 HARV. L. REV. 473, 474 n.11 (1964).

[51] This, presumably, would not include minor traffic infractions, which are considered civil in nature.

[52] See generally Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 318-19 (1942).

[53] DEL. CODE ANN. tit. 11, §§ 1902-03 (1953); R.I. GEN. LAWS ANN. §§ 12-7-1 to -2 (1956).

[54] N.H. REV. STAT. ANN. §§ 594:2, 594:3 (1960).

[55] MASS. GEN. LAWS ANN. ch. 41, § 98 (1961); HAWAII REV. LAWS §§ 255-4, 5 (1955) (reasonable suspicion—forty-eight hours); MO. REV. STAT. § 544.170 (1959) (suspicion—twenty hours).

[56] People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956); People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964); People v. Henneman, 367 Ill. 151, 10 N.E.2d 649 (1937) (dictum); State v. Chronister, 353 P.2d 493 (Okla. Crim. App. 1960); City of Portland v. Goodwin, 187 Ore. 409, 210 P.2d 577 (1949); State v. Hatfield, 112 W. Va. 424, 164 S.E. 518 (1932). Some federal courts have also upheld detentions. United States v. Vita, 294 F.2d 524, 530 (2d Cir. 1961); United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960), *rev'd on other grounds*, 285 F.2d 408 (2d Cir. 1960).

[57] People v. Rivera, *supra* note 56. The court emphasized at the outset that the New York "stop and frisk" statute was not applicable to the case and no decision was reached concerning it because its passage was subsequent to Rivera's trial.

three plainclothes detectives, while cruising about lower Manhattan, observed two men walking by a bar and grill. The men stopped, looked in the window, continued to walk a few steps, came back, and looked in the window again. Upon observing the unmarked police car they began walking rapidly away. One of the detectives then got out of the car and ordered the two men to stop. The detective then approached Rivera and proceeded to "frisk" him by "patting" his clothing, whereupon a .22 caliber gun was discovered. In a subsequent trial for criminally carrying a loaded pistol a motion to suppress the seized evidence was granted because the officer at the time of the search *lacked probable cause.* On appeal from the motion to suppress, the Appellate Division affirmed but was reversed by the Court of Appeals.

Briefly, the Court of Appeals held that the stopping of Rivera was only for the purpose of inquiry and did not constitute an arrest. Being an inquiry and not an arrest, it was *not* subject to the requirements of the fourth amendment and was authorized by a belief less than probable cause. The court emphasized that the right to detain is a necessary police investigative tool[58] which was recognized at early common law. The "frisk" incident to the detention was then carefully distinguished by the court from a search on the basis of the extent of the invasion of privacy which had occurred. Because the frisk was a lesser invasion the court felt that "[i]t ought to be distinguishable . . . on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person."[59] The sense of exterior

---

[58] Barret, *Personal Rights, Property Rights and the Fourth Amendment,* 1960 SUPREME COURT REVIEW, 46, 59, 63-65. Other authors have attempted to justify the detention on the ground that, contrasted to an arrest, it is less conspicuous, less humiliating to the person stopped, and offers less chance for police coercion. See LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices,* 1962 WASH. U.L.Q. 331, 356-60. That detentions would tend to prevent police coercion is questionable because a magistrate's review of cause for the detention would never occur and police would be free to abuse the privilege. In contrast, a search based upon probable cause requires a magistrate's review even when incident to an arrest. As Mr. Justice Douglas stated in Abel v. United States, 362 U.S. 217 (1960), a case involving an "administrative arrest" on less than probable cause: "Some things in our protective scheme of civil rights are entrusted to the judiciary. Those controls are not always congenial to the police. Yet if we are to preserve our system of checks and balances and keep the police from being all-powerful, these judicial controls should be meticulously respected." *Id.* at 247. See also Jaffe, *Judicial Review: Question of Law,* 69 HARV. L. REV. 239, 274 (1955).

[59] People v. Rivera, 14 N.Y.2d 441, 446, 201 N.E.2d 32, 37, 252 N.Y.S.2d 458, 463 (1964).

touch, the court explained, is quite similar to the sense of sight or hearing which the police customarily use. Something less than probable cause was sufficient to authorize a "frisk", although the exact degree of belief necessary was not stated. The court concluded by citing *Ker*[60] for the proposition that the states are free to establish workable rules to meet local problems.

The court, in *Rivera,* distinguished the *detention* from an *arrest* on the basis of the degree of invasion of the individual's freedom of movement which had occurred. Similarly, they distinguished a *frisk* from a search on the basis of the invasion of the individual's right to privacy which had occurred. Because the invasion of the individual's rights had been slight in both cases the court felt that probable cause was not necessary; the less the invasion the less the probability necessary to justify it.[61]

This is not a new approach to the fourth amendment. Since the adoption of the reasonableness test in *Rabinowitz,*[62] several authors have suggested that a calculus of reasons should be developed, out of which a determination of reasonableness could be made. In determining the reasonableness of any invasion of rights protected by the fourth amendment, consideration would have to be given to the community need prompting the search, the probability of success, the seriousness of the invasion of privacy involved, possible sanctions which might be imposed subsequent to the search, and the possible injury to reputation which might occur. Under such an approach the probability of success (*i.e.* probable cause) would be only one factor in determining the reasonableness of the search. If the other factors were of sufficient

---

[60] Ker v. California, 374 U.S. 23 (1963).

[61] As Mr. Justice Rutledge pointed out in Brinegar v. United States, 338 U.S. 160 (1949), when dealing with probable cause we are speaking in terms of probability. This probability refers to the likelihood of a search being successful. In all cases probable cause (*i.e.* a certain probability that the search will be successful) must exist before the search is initiated for it to be reasonable. No matter how great the societal need which prompted the search, probable cause must be present; even a threshold entry requires probable cause. Unlike the other requirements of a reasonable search, the probable cause requirement is not balanced against the needs of society. Thus probable cause (*i.e.* probability that the search will be successful) is the same to validate a search for a bomb in a large office building as the probable cause which will validate a search for the fruits of a minor crime such as petty larceny. Even though the societal need for the search for a bomb is substantially greater, the probability that must be shown is the same.

[62] United States v. Rabinowitz, 339 U.S. 56 (1950).

weight, a belief less than probable cause would justify the search (as in *Rivera*).[63]

Proponents of this approach to the determination of reasonableness point to *Frank v. Maryland*[64] in support of their position. In *Frank*, a city health inspector made a search of the appellant's premises for "rats and rubbish". The inspector lacked probable cause on which to base the search. The Supreme Court upheld the search, even in the absence of probable cause, distinguishing an *administrative* search, as in *Frank*, from a search which might be the prelude to the imposition of subsequent *criminal sanctions*. The danger to the security of the individual, the Court felt, is greater when the search is a preliminary step in a process which might ultimately lead to trial and conviction. "The test of 'probable cause' . . . [must take] into account the nature of the search that is being sought."[65] Seemingly this indicates a recognition by the Court that its previously used balancing test is inadequate and that public policy might require a belief less than probable cause in certain cases.

But does *Frank* indicate a willingness on the part of the Court to allow a lesser degree of probability where the possibility of a resulting criminal sanction exists? No Supreme Court decisions support the contention that it does, and in light of the Court's increasing solicitude toward criminal defendants it is doubtful there will be such a decision.[66] Although the Supreme Court has

---

[63] Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961); Leagre, *The Fourth Amendment and The Law of Arrest*, 54 J. CRIM.L., C.&P.S. 393 (1963).

[64] 359 U.S. 360 (1959).

[65] Even the dissent recognized a distinction between the "administrative search" and the search for "fruits" of a crime but felt there should be a magistrate's review of cause in both cases. *Id.* at 383.

[66] The only support for this proposition is Mr. Justice Jackson's dissenting opinion in Brinegar v. United States, 338 U.S. 160 (1949), where he implied that a calculus of reasons might be the appropriate method of analyzing search and seizure problems. "[I]f we are to make judicial exceptions to the Fourth Amendment . . . it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a

not been faced directly with the problem of detention, in *Henry v. United States*[67] a majority of the Court agreed that the mere stopping of the defendant's car was an arrest. This reaffirmation of the requirement that even a "threshold entry" must be based upon probable cause suggests a rejection of the "calculus test" used in *Rivera.*

Even though the Supreme Court does not distinguish between the evidence necessary for a slight or substantial invasion of privacy, the detention authorized under the "stop and frisk" statute may still be constitutional if the Nebraska courts, in interpreting the statute, equate reasonable suspicion with probable cause.[68] If this occurs, the search incident to the detention *may* also be constitutional, if incident to an arrest.[69] If, however, reasonable suspicion is interpreted to be a standard less than probable cause the detention and the search incident to it would be unconstitutional under the existing standards of reasonableness.[70]

This is not to say that all detentions are unconstitutional. An officer may constitutionally detain and question an individual so long as he is *not detained against his will.* Officers are not prohibited by the constitution from making good faith inquiries and observations to prevent crimes they reasonably believe are about to occur. Once the individual has refused to cooperate, however, he cannot be detained against his will unless probable

---

few bottles of bourbon and catch a bootlegger." *Id.* at 183. See Kaplan, *Search and Seizure: A No Man's Land in the Criminal Law,* 49 CALIF. L. REV. 474 (1961).

[67] 361 U.S. 98 (1959). Two states have interpreted *Henry* to be based on the Supreme Court's supervisory powers and having no constitutional basis. People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963); Commonwealth v. Lehan, 196 N.E.2d 840 (Mass. 1964).

[68] If the detention is upheld problems of self-incrimination arise. See Remington, *Police Detention and Arrest Privileges,* 51 J. CRIM.L., C.&P.S. 386, 391 (1960). Certainly an individual who is stopped does not have to talk to a policeman. Nor can failure or refusal to talk bear upon probable cause. See Broeder, *Wong Sun v. United States: A Study in Faith and Hope,* 42 NEB. L. REV. 483, 493-95 n.40 (1963).

[69] This statement is qualified because the right to search does not always follow from the arrest. For example, an arrest for a minor traffic violation will not sustain a search. See Comment, 6 WAYNE L. REV. 413 (1960).

[70] Because the statute, in authorizing a detention, fails to (1) adequately state the period for which the detention is allowed, (2) state the evidence necessary to establish reasonable suspicion, and (3) limit the use of the detentions to specified situations, the statute may fall under the void-for-vagueness doctrine. See generally Note, *The Void-For-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

cause for an arrest exists.[71] If the "stop and frisk" statute is interpreted to authorize a detention only so long as an involuntary restraint is not made, the detention clause of the statute is clearly constitutional.[72] This interpretation, however, would simply make the statute declaratory of pre-existing law.

D. The "Knock Not" Provision

The 1965 session of the legislature adopted the companion bill to the "stop and frisk" act, the "knock not" statute,[73] which also originated in New York.[74] This statute provides that an officer may break into a building to execute a warrant without notice of his authority if the magistrate issuing the warrant finds either that the property may be easily destroyed or, that the life or limb of the officer may be endangered if such notice is given.

Prior to the passage of this statute, a police officer in Nebraska, in executing either an arrest or search warrant, was required to give notice of his office and purpose before entering. Only after he was refused admittance was he allowed to break into the building to execute the warrant.[75] The "knock not" statute, however, allows the officer to enter, in certain circumstances, without giving notice. The Nebraska statute, requiring that notice be given before entry, is identical to the federal statute[76] which has been adopted in most of the states, and is simply a codification of a common law principle.[77] Similarly, the "knock not" statute is a codification of the doctrine of "exigent circumstances" which allows a deviation from the fourth amendment requrement of notice where necessity requires.

---

71 Broeder, *supra* note 68.

72 The search clause would still be unconstitutional, however, because all searches require probable cause.

73 Neb. Laws 1965, ch. 149 at 491. See generally Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States & Ker v. California,* 112 U. Pa. L. Rev. 499 (1964).

74 N.Y. Code Crim. Proc. § 799.

75 Neb. Rev. Stat. § 29-411 (Reissue 1964).

76 18 U.S.C. § 3109 (1964) provides, in part: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance. . . ."

77 The doctrine dates back to the early English case of Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (1603), where the rule was stated that: "In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house . . . . But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors. . . ." *Id.* at 91b, 77 Eng. Rep. at 195.

Although the constitutionality of the statute has not been ruled on, in *Ker v. California*[78] state police officers, without a warrant, executed a search incident to an arrest without giving notice before entry. California had adopted the federal statute requiring that all searches be preceded by notice.[79] But the California court had judicially made an exception to the statute. Where the articles to be seized could be easily destroyed notice was unnecessary.[80] The defendant in *Ker* was known to be in possession of narcotics which were easily disposed of and an entry without notice was therefore "lawful" under the California statute. In affirming the seizure of the narcotics when the entry had been made without notice, the Supreme Court held that "in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment."[81]

The *Ker* decision answers the question of the constitutionality of the "knock not" statute, for if it is constitutionally reasonable for an officer on the scene to determine that cause exists for waiving the announcement requirement, a fortiori it is reasonable under the fourth amendment for a magistrate to determine, at the time the warrant is issued, that justification exists for waiver of the announcement requirement.

While the *Ker* decision turned on the destructibility of the articles sought to be seized, the doctrine of "exigent circumstances" would certainly allow an officer who reasonably believed that announcement of entry would endanger his life to waive the notice requirement.[82] There is little doubt the statute is constitutional so long as the announcement requirement is discriminately waived.

---

78 Ker v. California, 374 U.S. 23 (1963).

79 CAL. PEN. CODE § 844.

80 People v. Ruiz, 146 Cal. App. 2d 630, 304 P.2d 175 (1956); People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956), *cert. denied*, 352 U.S. 858 (1956).

81 Ker v. California, 374 U.S. 23, 40-41 (1963).

82 There appears to be only one reported case in which danger to the officer making the search was recognized. Read v. Case, 4 Conn. 166 (1822). Nevertheless, the justification for waiver of the announcement requirement would be substantially greater where there was danger to the officer than where the justification was only acquisition of evidence.

III. CONCLUSION

Certainly any legislative attempt to clarify and establish reasonable standards of search and seizure should be commended. Unfortunately, however, some of Nebraska's recent legislation has not been directed toward the solution of these problems. Instead, the legislature appears to have attempted to pacify highly vocal law enforcement groups who insist that recent Supreme Court decisions, and *Mapp* in particular, have severely restricted law enforcement agencies[83] (with a resulting increase in the crime rate).[84]

> Police and prosecutors strenuously resist what they like to call "tighter restrictions" on their powers. But more often than not, what they are really bristling about is tighter *enforcement* of long standing restrictions. Thus, many in law enforcement reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure *had just been written.*[85]

Nevertheless their pleas for greater discretion in investigative procedures have fallen on receptive ears. Thus, the legislature, interested in an "apparently simple solution" to the crime problem has yielded to their demands and passed the desired legislation. Typical are the "stop and frisk" and "evidentiary search" statutes, which, if upheld, would substantially impair the constitutional rights of the citizens of the state of Nebraska.

In contrast, the procedural statutes and the "knock not" provision provide workable standards for the courts and law enforcement agencies without unreasonably encroaching upon the individual's rights. Such legislation is commendable. Future legislative attempts can be equally satisfactory if the legislature will keep in mind the statement made by Mr. Justice Clark in *Ker* when referring to the application of the fourth amendment standards to the states:

---

[83] Typical is the statement made by Senator Eugene Mahoney of Omaha, a former Omaha police vice squad officer and sponsor of the "stop and frisk" and the "knock not" statutes. "The U.S. Supreme Court has hindered police efforts with recent decisions. We need some laws that will help the police, not the criminals." The Lincoln Star, Feb. 19, 1965, p. 6, col. 1.

[84] Considerable gloss has been removed from the argument that recent decisions unduly hinder law enforcement agencies by the FBI's excellent record under the federal standards. See generally Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI,* 37 IOWA L. REV. 175 (1951); see also Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts,* 49 CORNELL L.Q. 436 (1964).

[85] *Id.* at 440.

The states are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, *provided* that those rules do not violate the constitutional proscriptions of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissable against one who has standing to complain.[86]

E. John Stanley '66

[86] Ker v. California, 374 U.S. 23, 34 (1963). (Emphasis added.)